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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 153

CLARENCE DUKE MCGANN,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

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Opinion Below

The order of this Court granting the petitioner's motion for leave to proceed *in forma pauperis* and on petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit handed down on the 29th day of June, 1959 (R. 55).

Jurisdiction

The judgment of the Court of Appeals was entered on March 5, 1959 (R. 54). The petition for writ of certiorari was filed on March 23, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statement

Petitioner on September 20, 1954, in the United States District Court for the District of Maryland entered his pleas of guilty in Case No. 23017 for armed bank robbery, a sentence of twenty years was imposed. On the same day and at the same time sentence was imposed in Case No. 23023 interstate transportation of a stolen motor vehicle, sentence was for five years concurrent with the above twenty year sentence. And on the same day and at the same time petitioner pled guilty to Case No. 23024, robbery on the maritime and territorial jurisdiction of the United States and was sentenced to five years concurrent with the above twenty year sentence. These sentences have no direct bearing on the instant case except that the Government has used this fact to deny relief to petitioner under 2255. On June 28, 1955, the petitioner entered a plea of guilty to indictment Cr. 146-180 in the Southern District of New York charging petitioner in one count robbery of the Carver Federal Saving and Loan Association in violation of 18 U.S.C. 2113. He was sentenced to twenty years imprisonment, to run concurrently with the sentences imposed by the United States District Court of Maryland above set forth. The sentence likewise has no direct bearing on the issues in this case, except that it was involved in promises made to petitioner.

The case involved in this hearing grows out of an indictment charging the petitioner in the United States District Court for the Eastern District of New York with violation of 18 U.S.C. 2111, in that on or about April 21, 1954, petitioner, with co-defendant, committed an armed robbery at the Veterans Administration Hospital, Brooklyn, New York. Petitioner entered a plea of not guilty (R. 1). On July 8, 1959, petitioner withdrew a plea of not guilty and

entered a plea of guilty (R. 2). On August 8, 1955, petitioner orally in open court asked leave to withdraw his plea of guilty. This motion was summarily denied and petitioner was not afforded the opportunity of taking the stand and presenting his reasons or evidence why such plea of guilty should be allowed to be withdrawn. Petitioner was sentenced to a term of imprisonment for twelve years, to run concurrently with the sentence of twenty years imposed on September 20, 1954, for bank robbery in the District of Maryland (R. 5).

On April 2, 1958, petitioner filed a motion to vacate sentence pursuant to 28 U.S.C. 2255 alleging that he was innocent of the charge of which he pleaded guilty and that the plea was made under duress and undue influence (R. 3 & 4). A memorandum opinion of April 8, 1958, by the District Court (R. 5), denied this motion; remarking that there was no amplification of the bare charge of duress, and stated that the records showed that petitioner "was fully informed and advised of his rights, and had the benefit of counsel, before acceptance of the plea" (R. 5). On April 14, 1958, petitioner filed in the District Court an application for permission to appeal *in forma pauperis* and an affidavit in support thereof (R. 6 & 7). On April 18, 1958, the District Court denied this motion and certified that the appeal was not taken in good faith (R. 9). Thereafter, petitioner filed in the Court of Appeals a petition, an affidavit for leave to appeal *in forma pauperis* (R. 9). Petitioner was not brought to court to testify in his own behalf on the grounds set out in his motion to vacate, affidavits of an Assistant United States Attorney, Marie L. McCann were filed in the District and Circuit Courts and used in opposition to the motions (R. 12-47). On July 21, 1958, the Court of Appeals denied the motion for leave to proceed *in forma pauperis* and ordered that the appeal be dismissed (R. 17).

On August 28, 1958, the Court of Appeals denied the motion "without prejudice to another motion in the District Court upon a different and more complete statement of facts" (R. 21).

On October 16, 1958, petitioner filed a new motion in the District Court to vacate sentence pursuant to 28 U.S.C. 2255 (R. 22-23). In this motion, petitioner alleged that the attorney, Mr. Altman, who had been appointed to represent him in a bank robbery charge against him in the Southern District of New York, had told him that if he cooperated with the Assistant United States Attorney, Mr. George S. Leisure, Jr., the government would ask for a suspended or very light sentence in the Southern District case; that petitioner withdrew his not guilty plea and pleaded guilty in the Southern District case; that Mr. Leisure confirmed the promises he had made to the petitioner's court appointed attorney; that Mr. Leisure asked petitioner to change his plea of guilty in the Eastern District case (the case involved); that petitioner told Mr. Leisure that he would do this if the government attorney in Eastern District case would make the same agreement as that made between petitioner and Mr. Leisure (R. 27). Petitioner further alleged that Mr. Leisure contacted Miss Marie McCann, the government attorney in the Eastern District case; that on June 29, 1955, Miss McCann and another government attorney came to see petitioner in prison; that Miss McCann agreed to ask that "a suspended sentence be given, or if sentence was imposed that a light sentence be imposed so as not to interfere with petitioner's chances in the Maryland case" (R. 27); that petitioner pleaded guilty in the Eastern District case on July 8, 1955; that on August 3, 1955, petitioner realized he had been tricked since the government attorney in the Southern District case had not kept his promise and was trying to "get

petitioner more time"; that, therefore, on August 8, 1955, petitioner made a motion to withdraw his plea of guilty in the Eastern District case, since it was entered as a result of fear, coercion, or mistake; that the District Court's refusal of the motion to withdraw the plea, without allowing petitioner to give the reasons for the motion and without making any findings of fact or conclusions of law thereto was error (R. 31-32).

In a memorandum opinion of November 18, 1958, the District Court denied the motion to vacate sentence (R. 40). On December 10, 1958, petitioner filed an application for leave to appeal *in forma pauperis* from the District Court's order of November 18, 1958 (R. 46). The District Court denied this motion on December 14, 1958, by simply using the word "Denied" endorsed on the notice of appeal. On December 23, 1958, petitioner filed in the Court of Appeals a petition for leave to appeal *in forma pauperis* and an affidavit in support thereof (R. 43), the date December 10, 1958, on this motion is a printing error. An affidavit opposing this petition (R. 47), a Miss McCann, a government attorney, stated that "your deponent categorically denies that she ever made any such promises to the defendant and she has had a conversation with Mr. Leisure in which he indicated a willingness, if necessary, to submit an affidavit that he made no such promises" (R. 49). On March 5, 1959, the Court of Appeals denied petitioner's petition to proceed *in forma pauperis*, and granted the government's cross-motion to dismiss the appeal (R. 54). The petitioner at no time on any of his motions to vacate his sentence under 28 U.S.C. 2255 was afforded the opportunity to be present and testify in support of the allegations set out in his motions. It is this ruling of the Court of Appeals which petitioner complains of and upon which this court granted certiorari.

Statute 28 U.S.C. Section 2255, this section reads in part as follows:

> "A prisoner in custody under sentence of a court established by act of Congress claiming the right to be released upon the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."
>
> "A motion for such relief may be made at any time."
>
> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States' attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct a sentence as may appear appropriate."
>
> "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." 63 Stat. 105.

Rule 11 of the Federal Rules of Criminal Procedure, 18 U.S.C.:

> "A defendant may plead not guilty, guilty, or, with the consent of the court nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refused to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Rule 32(d) Federal Rules of Criminal Procedure, 18 U.S.C.:

> "Withdrawal of Plea of Guilty on a motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but, to current manifest injustice of the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Questions Presented

1. Where issues of fact within petitioner's knowledge are presented, and the files and records do not show that the petitioner is entitled to no relief, is the trial court obligated by the mandate of Title 28 Section 2255 to grant a prompt hearing thereon and order the petitioner to be produced in open court to testify as to the factual questions presented by his motion?

2. Did the trial court err in summarily denying petitioner's motion to withdraw his plea of guilty before imposition of sentence, without granting a prompt hearing

thereon and affording petitioner an opportunity to testify and adduce evidence in support of his motion?

ARGUMENT

In the District Court petitioner attacked his judgment through a collateral issue involving constitutional violations. One of these violations being that the petitioner was induced to plead guilty by promises made to him by government agents. Namely, two United States' Attorneys assigned to the District Court for the Eastern District and Southern District of New York, who on the 29th day of June, 1955, came to the City Prison at 125 White Street, New York City, prior to the time that the petitioner changed his plea to guilty. During this visit the petitioner's attorney was not present nor was any other official or officers, including the F.B.I. The names of the government attorneys are as follows: Miss Marie McCann and Mr. Kenneth G. Sternberg.

The petitioner contends that his plea of guilty was induced by promises of leniency made by the above named Assistant United States Attorneys, as well as the Assistant United States Attorney for the Southern District of New York.

May the voluntariness of a plea of guilty be inquired into under Title 28 U.S.C. Section 2255?

This question was clearly answered in *Rusiere* v. *U. S.*, 10th Circuit, 1957, 249 F. 2nd 295 at pages 294-295 wherein the Court stated:

> "Fundamental standards of procedure in criminal cases require that a plea of guilty to a charge or charges contained in an indictment or information be entered freely, voluntarily, and without any semblance

> of coercion. A plea of guilty interposed as a result of coercion is not consistent with due process and therefore judgment and sentence imposed pursuant to such a plea cannot stand."

This ruling on a motion to vacate sentence was made in the *Rusiere* case despite the fact that the petitioner therein had originally made his plea of guilty when he was accompanied by counsel of his choice. The same result was reached when the petitioner was represented by appointed counsel in the case of *Motley* v. *U. S.*, 5th Cir., 1957, 230 F. 2nd 110, and when the petitioner was not represented by counsel in *Shelton* v. *U. S.*, 1958, 358 U.S. 26, 78 S. Ct. 563. All of these cases were brought under Title 28 U.S.C. Section 2255.

The importance of the inquiry into the voluntariness of a plea of guilty was eloquently stated by Circuit Judges Richard T. Rives and John R. Brown, dissenting in *Shelton* v. *U. S.*, 246 F. 2nd 571 at page 580.

> "We are dealing here not with any logician's exercise in which we carve up these variables into neat little categories. We are dealing here not with whether the accused was in any way misled or imposed on. We are dealing with the fundamental requirement of our system that the machinery of the law in no way be used to bring about the guilty plea with its awful finality unless it represented the genuine free expressions of the prisoner's will. Anything less means, if history is our guide, that it is man and his freedom, not the unfortunate prisoner in the dock, who is imposed on."

Certiorari was granted in the above case, and the dissenters were sustained: *Shelton* v. *U. S.*, 1958, 358 U.S. 26, 78 S. Ct. 563.

Is the voluntariness of a plea of guilty such an issue as to necessitate producing the prisoner for a hearing?

If, as the petitioner in the instant case, has attempted to prove by the facts alleged in his motion to vacate sentence in challenging the voluntary character of his plea, and if a proceeding under Title 28 U.S.C. Section 2255, is the correct method of reaching such an issue, it remains to be determined whether the voluntariness of such a plea of guilty can be resolved on appeal or whether a hearing in the trial court, the petitioner should be produced for that hearing.

That the factual issue of the voluntariness of a plea in the trial court should not be determined upon appeal becomes apparent when we considered the purpose of the requirement of Title 28 U.S.C. Section 2255, that findings of fact and conclusions of law be made.

These purposes, as described by the 8th Circuit in *Michener* v. *U. S.*, 177 F. 2nd 422, at page 424, are as follows:

> (1) To enable the appellate court to determine the grounds upon which the trial court reached its decision.
>
> (2) To enable the defeated party to determine whether the case presents a question worthy of consideration by the appellate court;
>
> (3) To spare appellate court the necessity of searching the record to supply findings of fact.

It is evident that none of these purposes would be served by a naked conclusion to this honorable court as to the voluntariness of the plea. When such question of voluntariness was presented to the 5th Circuit under similar proceedings in the case of *Motley* v. *U. S.*, 230 F. 2nd 110 at page 111, it was said:

"This court has uniformly held, as has the Supreme Court, that where issues of fact within movant's knowledge are presented, the motion should not be disposed of without an adequate hearing. Applying that rule to the facts of this case, we think it clear that it was error for the District Judge to dispose of appellant's petition without a hearing on the issues tendered in his petition and supported in his traverse, that he was induced upon the promise of leniency to enter his plea."

Further reasons for requiring findings of fact from the trial courts on such issues were cited in *Bishop* v. *U. S.*, 223 F. 2nd 582, at page 592.

"Another reason for requiring findings here is suggested by our decision in Quinn v. U. S. (1952, 91 U.S. App. D.C. 344, 349, 203 F. 2nd 20, 25, certiorari granted, 1954, 347 U.S. 1008. 74 S. Ct. 861). There we were urged to affirm a criminal conviction on a ground not considered below. Although all the evidence bearing upon the ground was included in the record on appeal, we declined to make an original finding of fact, an important reason being—that one of the substantial rights accorded a criminal defendant by statute in the federal courts is the right of appeal. Were this court to affirm the conviction on a finding not considered below, the defendant would in effect be deprived of that right, for our finding, in the first instance, on the main issue, would be subjected to review only on the grant of certiorari by the Supreme Court; the finding which this court makes are, at least, doubtful yet they can be reviewed only on the grant of certiorari by the Supreme Court. Patently, this diminishes the right of appeal to the court of appeals which is specifically conferred by Section 2255."

Once again the views expressed in this dissenting opinion by Circuit Judge Davil L. Baselon were sustained on certiorari when the Supreme Court reversed the judgment of the circuit court and then ordered that a finding of fact be made in the trial court. (*Bishop* v. *U. S.*, 350 U.S. 961, 78 S. Ct. 440.) If it be granted that the issue of voluntariness should be the subject of a specific finding in the trial court, the further question remains as to whether the prisoner himself should be permitted to appear at such a hearing, as he has requested in his petition for motion to vacate and set aside sentence. The general rule as to when the defendant should be produced was stated in *Barrett* v. *Hunter,* 10th Cir., 1950, 180 F. 2nd 510, at page 514:

> "Under Section 2255, the court may entertain and determine the motion without requiring the production of the prisoner. We do not think it was intended by such provision to give the court an absolute discretion. Rather, we think the intention was to provide that the court may entertain and determine the motion without requiring the production of the prisoner when the motion or the records and files of the case conclusively show that the prisoner is not entitled to any relief; or where the presence of the petitioner or prisoner is unnecessary to afford him the relief which he is entitled, or where the only issues of law are presented.
>
> "But where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally, in the exercise of sound discretion, the court should require the production of the prisoner."

Not only does the petitioner's motion raise substantial issues of fact, but the respondent's motion acknowledged

and admitted the fact that they came to the City Prison and talked to the petitioner, without the petitioner having benefit of counsel present.

This acknowledgment of extra judicial proceedings, including the use of *ex parte* affidavits, upon the part of the government, was substantial enough in the eyes of the petitioner to require a hearing in open court. This general rule was affirmed in *U. S.* v. *Hayman,* 342 U.S. 205, 72 S. Ct. 263 (1952), at pages 219, 220:

> "The issues raised by respondent's motion were not determined by the files and records in the trial court. In such circumstances, Section 2255, requires that the trial court act on the motion as follows:
>
> > 'Cause notice thereof to be served on the United States attorney. Grant a prompt hearing thereon. Determine the issues and make findings of fact and conclusions of law with respect thereto.'
>
> "In requiring a hearing the section 'has obvious reference to the tradition of judicial proceedings.' Respondent, denied an opportunity to be heard, has lost something indispensable, however convincing the ex parte showing."

Again in *U. S.* v. *Hayman* at page 268 the court stated:

> "A prisoner in custody pursuant to a final judgment of a * * * court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the * * * court to proceed to judgment against him. * * * "

Again the court stated at page 273:

> "In order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is 'necessary or appropriate' to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law. The express language of Section 2255 that a 'court may entertain and determine such motion without requiring the production of the prisoner at the hearing' negative any purpose to leave the sentencing court powerless to require production of the prisoner in an appropriate case."

The trial court permitted the government to file affidavits of assistant United States attorneys and considered those affidavits when the court decided the motion and denied it. So it cannot be said that the court did not hear evidence or require evidence on the motion. Certainly when the petitioner alleged that he was coerced into entering his plea of guilty he was the only person that had particular knowledge of the facts and circumstances and no judicial hearing could be had without his presence to testify in support of his motion. He likewise should have been afforded an opportunity to cross-examine the persons who made the affidavits and which affidavits were used against him by the government on his motion.

Did the district court have jurisdiction to sentence the petitioner?

The jurisdiction of federal courts (their power to adjudicate) is a grant of authority to them by the Congress. The lower federal courts are inferior courts of limited jurisdiction, that is with only the jurisdiction which Congress has prescribed when parties are brought before them in accordance with the requirement of due process; to determine the cause, and for such purpose to construe and apply the statutes under which they are asked to act.

Petitioner submits:

That at the time he made his motions to trial court, before imposition of sentence, to withdraw his plea of guilty and reenter his plea of not guilty it became the duty of the trial court to ascertain why the petitioner wished to withdraw his plea of guilty, by granting a hearing and make findings of fact, and conclusions of law thereto. However, the court summarily denied his motion to withdraw his plea of guilty without affording petitioner an opportunity to testify or advance any evidence as to why the plea should be allowed to be withdrawn. Rule 11 of the Rules of Federal Criminal Procedure, 18 U.S.C. provides that a court shall not accept a plea of guilty without first determining that the plea is made voluntarily with understanding of the nature of the charge. Rule 32(d) says that a motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended, but to correct manifest injustice, a court may permit the withdrawal of a plea of guilty to be made after sentence. Petitioner admits that a plea of guilty is itself a conviction and as conclusive as a verdict of a jury. That one entering such a plea may be held bound by it. And also that a defendant who enters a plea of guilty has no legal right to withdraw it. *Hoyt* v. *U. S.*, 252 F. 2nd 460, 10th Circuit and *Ellison* v. *U. S.*, 263 F. 2nd 395-396 and *United States* v. *Nigro*, 262 F. 2nd 783-787. However upon examination of these cases it will be found that inquiry was made as to whether or not there were any substantial grounds for the withdrawal of the plea of guilty. The courts at least afforded the petitioners in those cases the right to a hearing in which it was determined from evidence that there was no basis or justification for the withdrawal of the plea of guilty. In the instant case the court summarily denied the motion in open court without a hear-

ing and without listening to any evidence or affording the petitioner a chance to say a word in behalf of his motion to withdraw his plea. See *Townsend* v. *Burke,* 334 U.S. 736, 738, 68 S. Ct. 1252, 1254.

> "Withdrawal of a plea of guilty will be permitted if it clearly appears that the plea was entered by defendant as a result of failure, coercion or mistake. The denial of a court to allow withdrawal of a plea of guilty is a reversible error. It is necessary that the accused show in support of his motion that the plea of guilty should not be allowed to stand against him because of some reason existing when it was entered, but for which he could not have entered the plea, and that reason must amount to fraud or an imposition upon him or a misapprehension of his legal rights."

It is true that an application for leave to withdraw a plea of guilty is addressed to the sound discretion of the trial court. *Callahan* v. *U. S.,* 10th Cir., 35 F. 2nd 633, 634; *U. S.* v. *Mignoga,* 2nd Cir., 157 F. 2nd 839, 840, certiorari denied, 330 U.S. 830, 67 S. Ct. 863, 91 L. ed. 1278. Certainly in arbitrary denial of a motion to withdraw a plea of guilty without affording petitioner the chance to present his evidence, state his reasons for such withdrawal, would constitute an abuse of discretion; that such denial also denied the appellant trial by jury under the constitution of the United States; and violated due process of law. That such a violation is fatal to the courts' jurisdiction (the power to adjudicate); which renders the sentence which was imposed upon the petitioner void. This view is supported by *Johnson* v. *Zerbst,* 304 U.S. 458; *Powell* v. *Alabama,* 287 U.S. 45 and *Glossear* v. *United States,* 315 U.S. 60.

It may well be argued by the government herein that Section 2255 is not available to petitioner because even if

he were successful it would not restore him to his immediate liberty. However, the true rule in respect to the use of 2255 has been stated in the case *Heflin* v. *United States,* 79 S. Ct. 451; 358 U.S. 415. Wherein the court at page 453 stated:

> "A majority however, are of the view, shared by several courts of appeals, that Section 2255 is available only to attack a sentence under which a prisoner is in custody."

Clearly in this case the petitioner is actually serving the sentence from the Eastern District of the United States because that sentence when it was imposed runs concurrently with the sentence he was given in the United States District Court of Maryland and it cannot by any stretch of the imagination say that he is not actually serving that sentence. So that the requirements set out in *Heflin* v. *United States* has been met by the petitioner herein. See also, *Nishimoto* v. *Nagle,* 44 F. 2nd 304.

The petitioner filed a motion in the nature of *coram nobis* in the District Court of Maryland which was denied, Crim. 23017 and 23024 without finding of fact or conclusion of law. Appeal to the 4th Circuit Court of Appeals was granted by the District Court *in forma pauperis.* However, the circuit court of appeals denied petitioner the right to appeal *in forma pauperis.* Petition for writ of certiorari is now pending in this court, No. 488, Misc. The contention involved is as follows:

> That he only committed one act in that district and that under two separate statutes he was indicted. It is his contention that the government should have been required to elect under which statute they intended to prosecute him and since they failed to do so and charged him under two separate statutes and im-

posed two separate sentences that their failure to elect renders only the sentence on the five year conviction ~~invalid.~~ void.

If the petitioner is successful in this case then the twenty year sentence imposed upon him in the District of Maryland would be void and the five year sentence has now been fully served. By the same reasoning if the petitioner herein is granted the right to go back to the Eastern District of New York and by proper evidence and proof show that his plea of guilty was entered into by coercion and that sentence should be set aside and vacated then since the Maryland twenty year sentence was void and the five year sentence has been fully served; he would not be serving any sentence under the Maryland cases; and if he prevailed in the Eastern District of New York he would be entitled to his freedom, this because the other sentence he received in the Southern District of New York would fall by the same standards.

CONCLUSION

The appellant's motion to vacate the sentence is grounded upon the facts that the existence of duress, coercion and undue influence rendered his plea of guilty involuntary; that the court's refusal to allow the withdrawal of his plea of guilty before imposition of sentence without making a finding of fact rendered the sentence imposed null and void. That the motion of the petitioner filed to vacate and set aside his sentence contained therein allegations of fact which only he could testify to and that under 2255 *supra* his presence was required and he should have been afforded an opportunity to testify in behalf of his motion; that findings of fact, conclusions of law should have been made at such hearing; that the word hearing as used in

the statutes requiring prompt hearing on a motion to set aside a sentence, has reference to tradition of judicial proceedings, and that a petitioner denied an opportunity to be heard in such proceeding has lost something indispensable, however convincing the *ex parte* showing. That the question of voluntariness is an issue of fact within petitioner's knowledge and hence should not be disposed of by the trial court without the petitioner's presence.

It is earnestly submitted that in view of these conclusions, the order of the district court denying petitioner's motion to vacate sentence should be reversed and the case remanded to the trial court for findings of fact on the voluntariness of petitioner's plea of guilty, with the appellant being present at the hearing of the motion to vacate and set aside the sentence; that otherwise the petitioner will be denied his day in court and deprived of his constitutional rights in violation of the provisions of 28 U.S.C. Section 2255.

Respectfully submitted,

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